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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 177

C. V. SORRELLS, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 27, 1932

CERTIORARI GRANTED OCTOBER 10, 1932

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[fol. 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NORTH CAROLINA, ASHEVILLE DIVISION, NOVEMBER TERM, 1930

No. 5972, Criminal

UNITED STATES OF AMERICA

vs.

C. V. SORRELLS

BILL OF INDICTMENT—Filed Nov. 13, 1930

The grand jurors for the United States empaneled and sworn at the term aforesaid of the court aforesaid, on their oath present that C. V. Sorrells, late of Haywood County, on the 13th day of July, 1930, in said division of said district unlawfully and feloniously did possess a large quantity, to-wit, one-half gallon of intoxicating liquor, to-wit, [fol. 2] whisky, in violation of the National Prohibition Act, with intent to sell and furnish the same for beverage purposes; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Second Count. And the grand jurors aforesaid, upon their oath aforesaid do further present that said C. V. Sorrells, on the 13th day of July, 1930, in said Western District of North Carolina, unlawfully and feloniously did sell to one R. V. Martin, a large quantity, to-wit, one-half gallon, of intoxicating liquor, to-wit, whisky, in violation of the National Prohibition Act, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

(Signed) Thomas J. Harkins, United States Attorney.

Endorsed: No. 5972. United States District Court, Western District of North Carolina, Asheville Division. United States of America vs. C. V. Sorrells. Haywood. Indictment. NPA JA Poss. & Sale. Witnesses: M. A.

White, R. V. Martin, x. Those marked thus "x" sworn [fol. 3] and examined by the foreman of and in the presence of the grand jury. —— ——, Foreman. A true Bill. James A. Hannah, Foreman.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PLEA

And thereafter, to-wit: on the 20th day of November, 1930, the said C. V. Sorrells came to the bar of the court here in his own proper person and having hearing of the said Bill of Indictment, and forthwith being demanded of him concerning the premises in said Bill of Indictment above specified, and charged upon him how he will acquit himself thereof, the said C. V. Sorrells doth say that he is not guilty thereof, and thereof for good and evil he do put himself upon the country; and the said Thomas J. Harkins. Esq., and the said Frank Patton, Esq., Attorneys of the District aforesaid, who in this behalf prosecuteth does the like.

And whereupon, on the 20th day of November, 1930, the panel of petit jurors selected, drawn and returned to the Court here in pursuance of the Statute in such cases, made and provided, being called, come:

Whereupon certain of them to-wit: J. F. Hampton, Bill Williams, R. J. Worley, T. E. Blackstock, M. L. Maney, R. A. Leonard, R. C. Cooper, Earl Jackson, E. M. Owenby, C. H. Buckner, S. C. Morgan and R. O. Buckner, twelve good and lawful men, selected, tried and sworn as the law directs to well and truly try and true deliverance make of the said defendant upon the issue joined herein, and a true verdict [fol. 4] render according to the evidence, and are now duly impannelled to try this case.

IN UNITED STATES DISTRICT COURT

VERDICT—NOV. 20, 1930

Thereafter, to-wit, on November 20th, 1930, after the conclusion of the trial, the jury retired and upon return to open court announces its verdict as follows:

"We, the jury, find the defendant, C. V. Sorrells, guilty."

The defendant moves for an arrest of judgment which motion is overruled. The defendant objects and excepts and the exception is then and there allowed; the defendant moves the Court to set aside the verdict as contrary to the law and the evidence which motion is overruled and the defendant objects and excepts and the exception is then and there allowed; and the defendant moves to set aside the verdict for other errors occurring during the progress of the trial and which appear on the face of this record. The motion is overruled and defendant objects and excepts and the exception is then and there allowed.

IN UNITED STATES DISTRICT COURT

JUDGMENT

The defendant being present in Court, it is ordered and adjudged by the Court that the defendant be imprisoned in the United States Penitentiary at Atlanta, Georgia, for a period or term of eighteen months.

IN UNITED STATES DISTRICT COURT

Bill of Exceptions—Filed March 3, 1931

A condensed and narrative form of the evidence offered by the government and the defendant in the above styled case, save as a proper understanding of the questions pre-
[fol. 5] sented may require that it be set forth otherwise.

Be it remembered that upon the trial of this case the government, to maintain the issue on its part, offered the following testimony:

M. A. WHITE, a witness for the government, being first duly sworn, testified as follows:

Examination.

By Mr. Patton:

Q. Your name is M. A. White?
A. Yes, sir.

Q. You are a prohibition officer?

A. Yes, sir.

Q. Were such officer on July 13th, 1930?

A. Yes, sir.

Q. Mr. White, the defendant, C. V. Sorrells, is indicted here for selling some whiskey on the 13th day of July?

A. On or about that date, in company with Mr. Martin, we went to Mr. Sorrells' home.

Q. Where is his home?

A. It's over in Haywood County, north of Canton—and he wasn't there the time we first visited there, and Mrs. Sorrells stated he would be in in something like an hour or two. We told her we would drive off and come back later on. We did, and we drove off and came back in about two hours, and when we came back that time Mr. Sorrells was not there, and we waited on him a while and started back to Canton, and met him, and when we got back to his house he was there, and we had a conversation with him about some whiskey. He went down below—in his house, and got a half gallon of whiskey, and brought it to the car, and said he would guarantee it would be all right. I tasted the whiskey there and gave him $6.00 for it. Later on, about two weeks, in company with Mr. Martin and Mr. Lance and myself, we went there and searched surrounding his premises, and about a hundred yards below his house, in a thicket, we found eleven one-half gallon fruit jars full of whiskey.

[fol. 6] Q. Where was that with reference to where he went after the half gallon of whiskey?

A. Exactly the same direction, and same way he went to get the half gallon of whiskey that day. We also found a ten gallon keg just above his house, out in the field, with three or four gallons of wine.

Q. Did he live in the country?

A. Yes, sir.

Q. How far from Canton?

A. I suppose some seven or eight miles.

Q. You only bought from him on one occasion?

A. I only bought on one occasion. Mr. Martin bought on one occasion. I wasn't there before this trip.

Cross-examination.

By Mr. Jordan:

Q. Mr. White, you say this was on the 13th of July?

A. I don't remember the date, Mr. Jordan.

Q. Well, it is alleged he sold it on the 13th of July, this year. I wish you would refresh your recollection and tell us, as a matter of fact that you were not there on the 13th of July?

A. Well, I think probably that—I am not sure that is the date, but that could have been changed from two different ways. My letter report will show exactly when I was there, but sometimes we make a case on one date, and when the letter report is made out, we date it from the date we are writing the letter report, and the record there shows on the 13th. I am not positive it was the 13th.

Q. Well sir, the bill of indictment under which this man is being tried, alleges he sold this liquor on the 13th day of July, 1930, and sold it to R. V. Martin. As a matter of fact the 13th of July was on Sunday. Were you ever at his house on Sunday?

A. No, sir. I don't think so. Mr. Martin was there when I went there.

Q. But you were not with Mr. Martin the first time?

A. No, sir.

Q. So the time you are testifying about now was not on the 13th of July, and wasn't on a Sunday?

A. No, sir.

Defendant moves that all of the testimony of this witness be stricken from the record, for that Defendant is indicted in the bill for the sale of liquor on the 13th day [fol. 7] of July, 1930, to R. V. Martin; this witness has testified that at another time, not mentioned in the bill, he went there and purchased liquor; the Defendant is not on trial for that, and was not apprised by the bill that he was indicted for that.

Mr. Patton: We are going to introduce evidence that he sold some to Mr. Martin on the 13th.

The Court withholds passing on Defendant's motion.

Defendant Excepts.

There being no further questions, witness stood aside.

R. V. MARTIN, a witness for the government, being first duly sworn, testified as follows:

Martin testified that he was a Federal Prohibition Agent and that on the 13th day of July, 1930, which was a Sunday, he visited the home of the Defendant C. V. Sorrells and in consequence of a conversation had with the defendant the defendant went off and returned shortly with a half-gallon of liquor for which the witness paid defendant the sum of $5.00. The witness further testified that he went to the home of the defendant again, accompanied by Federal Prohibition Agent, M. A. White, and the followinng testimony was had:

Q. You went with Mr. White?
A. Yes.
Q. When was that?
A. That was in August, I don't remember the exact date.
Q. Have you got any record of it?
A. Yes.
Q. Where is it?
A. I have a copy of my report. I didn't bring it with me, but I recall

Defendant objects.

The Court: Was it before or afterwards?
A. This? On the 13th day of July was when I went by myself and later in August agent White and I went out and purchased another half gallon which was delivered by the same man, Mr. Sorrells.

[fol. 8] Defendant objects to the questions and answers and moves that the questions and answers be stricken from the record.

Motion and Objection overruled.

Defendant Excepts.

On cross-examination the witness testified that he had been a Federal Prohibition Agent since January 6th, 1930, and that shortly before the alleged offense on the part of the defendant the witness went to Haywood County, N. C., accompanied by his wife and resided for a time in the village of Clyde, N. C., where he posed as a tourist. That he visited the home of the defendant on July 12th, 1930, at which time

the defendant was not at home and that he made such trip in company with two or three young men who were residents of the community in which the witness was temporarily staying. That on Sunday afternoon, July 13th, 1930, the witness again visited the home of the defendant, accompanied by Fanning Lowe, E. D. Jones and C. J. Snyder. That upon their arrival at the home of the defendant the witness was introduced to the defendant by Fanning Lowe the witness being introduced as a resident of Charlotte, N. C., and a tourist stopping for the time being at Clyde, N. C. That the witness had a considerable conversation with the defendant, lasting between fifteen and thirty minutes and that during the conversation the witness ascertained that the defendant was a veteran of the World War and a former member of the 30th Division A. E. F. That the witness informed the defendant that he, the witness, was also an ex-service man and was also a former member of the 30th Division A. E. F., which in reality was the truth. That the witness asked the defendant if he, the defendant, could get him, the witness, some liquor and that at first the defendant stated that he did not have any liquor. That later in the conversation the witness again asked the defendant if he, the defendant, could get him, the witness, some liquor and that there was further conversation between the two relative to the [fol. 9] securing of some liquor. That at the time of such conversation one of those present to-wit, E. D. Jones, was also an ex-service man and a former member of the 30th Division A. E. F. and some conversation was had between all present relative to the war experiences of the witness, the defendant and E. D. Jones. That the witness a third time asked the defendant to get him, the witness, some liquor and thereupon the defendant left his home and was gone a few minutes and came back with a half-gallon of liquor for which the witness paid the defendant the sum of $5.00. That the witness was the first and only person among those present at the time who said anything about securing some liquor and was the first person to mention the subject. That the witness at the time he asked the defendant to secure some liquor for him, the witness, did so with the express view and purpose in mind to indict and prosecute the defendant for procuring and selling the liquor and that such was the purpose of the witness when he went to the home of the defendant and procured the liquor. That after the witness pro-

cured the liquor from the defendant, the witness went before the United States Commissioner and took the proper steps to have the defendant arrested and subsequently tried for the said offense.

The government then rested its case and the defendant thereupon moved the Court for a directed verdict of not guilty or for a motion as of non-suit. The motion was overruled. The defendant objected and excepted and the exception was then and there allowed.

Defendant's Testimony

E. D. Jones, a witness for the defendant, being first duly sworn testified as follows:

That the witness was a resident of Clyde, N. C., which is in Haywood County, and was an ex-service man and a former member of the 30th Division A. E. F. That the witness became acquainted with the Federal Prohibition Agent, R. V. Martin, while the said agent was residing in Clyde, N. C., and the witness, together with C. J. Snyder and another man visited the home of the defendant on the [fol. 10] afternoon of Sunday, July 13th, 1930, and upon arrival the witness introduced the agent to the defendant; the witness stating to the defendant that the agent was an old 30th Division man and that the agent thereupon stated to the defendant that he, the agent, would like to get a half-gallon of good whiskey to take back to Charlotte, N. C. to a friend of his that was in the furniture business with him, the agent, and that the defendant replied to such request with the statement that he, the defendant, did not fool with whiskey. That after some conversation the agent again asked the defendant to get him some whiskey and the defendant stated that he would go and see if he could get a half-gallon of liquor, and that the defendant left his home and was gone between twenty and thirty minutes and upon his return delivered to the agent a half-gallon of whiskey. That the witness and the prohibition agent and the others were at the home of the defendant for probably an hour or an hour and a half and that during such time, the agent asked the defendant three or four or probably five times

to get him, the agent, some liquor. That the agent, Martin, was the first person to mention anything about liquor and that he, the agent was the first person to ask the defendant for liquor. That the witness introduced the agent to the defendant as a furniture dealer of Charlotte, N. C. because the agent had represented himself to the witness as being in the furniture business in Charlotte, N. C. That the witness and the defendant soldiered together in France as members of the 30th Division A. E. F.

On cross-examination the witness testified that he was by profession a brakeman on the railroad and at the time of the trial had been cut off from his employment for about six months. That he was a married man, then living at home with his father on the farm. That on the 13th of July, 1930, the agent, Martin, met the witness at a filling station and asked him, the witness, to get in the agent's car and take a ride; that after the witness had got in the car of the agent, the agent stated that he was going to the home of the defendant to get some good whiskey and that at that time the witness had never heard of the defendant [fol. 11] being in the liquor business. That the witness did not tell the agent that he did not know the defendant was in the liquor business because he, the witness, had been in the army with the defendant. That they, the defendant and the witness were two old buddies. That the witness believed that one former war buddy would get liquor for another. That the witness had taken a drink in the past six months, but did not want to tell who gave him a drink except, the witness stated, that the agent, Martin had given him a drink. That the witness had been convicted in 1920 for carrying a pistol and was fined $50.00 and costs and that the witness had been convicted for fighting and had paid a fine of $10.00 and costs, and that the witness had been convicted once for intoxication and that that was all the witness had ever been convicted of. That the witness knew that the defendant was an employee of the Champion Fiber Company of Canton, N. C., and had been employed by that company since 1924 and was still employed by such company at the time of the trial, and that the defendant worked every day; that the witness while he was employed by the railroad was engaged in switching on the Canton,

N. C. railroad yards of the Southern Railway, which is where the company is located for whom the defendant worked and that the witness saw the defendant at work practically every day.

C. W. STEVENS, a witness for the defendant, being first duly sworn, testified as follows:

That the witness was twenty-four years of age, a resident of Canton, N. C., in Haywood County, N. C., that he had known the defendant about twelve or fifteen years. That he knew the character and general reputation of the defendant in the community in which the defendant lived, and that the character of the defendant was good. That the witness was the Time-keeper and Assistant Paymaster of the Champion Fiber Co. at Canton, N. C., and that the defendant was at the time of the trial and had been for about seven years prior thereto an employee of the Champion Fiber Company, and that the defendant had been on his job continuously without missing a pay day since March, 1924, and the witness identified the original time-[fol. 12] sheet or payroll of the defendant showing his employment to have commenced in March, 1924, and continued through the last pay-roll prior to the trial of the defendant, to-wit: October 31st, 1930.

There being no cross-examination, the witness stood aside.

C. J. SNYDER, a witness for the defendant, being first duly sworn testified as follows:

That the witness was seventeen years of age, a resident of Haywood County, N. C., and that on the afternoon of Sunday, July 13th, 1930, the witness accompanied E. D. Jones and Prohibition Agent Martin, to the home of the defendant, where the agent, Martin, was introduced to the defendant by Jones. That there was some talk and conversation and then the agent, Martin, asked the defendant if he, the defendant, could get him, the agent, some liquor and that the defendant told the agent that he, the defendant, did not have any and did not fool with it at all. That there

was then some further conversation during which the agent, Martin, stated that he was a furniture dealer from Charlotte, N. C., and that he, the agent, again asked the defendant about getting some liquor. That the agent, Martin, asked the defendant three or four times to get some liquor before the defendant went off and returned with the whiskey.

On cross-examination the witness denied that he sold liquor or that he had agreed to sell some to the Agent, Martin. That the witness lives near Clyde, N. C., with his father on a farm and that he, the witness, had never been convicted in his life for anything. That the witness did not know that the agent, Martin, was an officer. That he, the witness, knew the defendant pretty well but denied that he, the witness, had ever bought any liquor from the defendant. That the witness had taken a drink of liquor [fol. 13] and that the agent, Martin, was the first and only man who ever gave the witness a drink of whiskey and that he, the witness, had not drunk any liquor since the agent, Martin, had left Haywood County, N. C.

On cross-examination the witness testified that at no time while he was in the company of the agent, Martin, did the agent ever ask him, the witness, anything concerning his age.

Fanning Lowe, a witness for the defendant, being first duly sworn testified as follows:

That the witness lives in Haywood County, N. C., about three or four miles from the home of the defendant and that he, the witness, was present at the home of the defendant on the afternoon of Sunday, July 13th, 1930, and was present when the agent, Martin, and the others arrived at defendant's house. That the agent, Martin, and his companions were at the home of the defendant something like an hour and a half and that the agent, Martin, asked the defendant about some liquor and that the defendant answered that he did not fool with it. That the agent, Martin, asked the defendant again about getting some liquor and that the defendant again replied that he did not fool with it. That the agent, Martin, was the first person in the crowd who

said anything about liquor and that he asked the defendant to get some liquor three or four times before the defendant went off and returned with the whiskey. That the witness had never been convicted of anything in his life and that the agent, Martin, said he was a furniture agent from Charlotte, N. C.

On cross-examination the witness testified that he was pretty well acquainted with the defendant and that he was in the defendant's home when the agent, Martin, arrived. That on Saturday, the day before the alleged offense, the [fol. 14] witness went with the agent, Martin, to the home of the defendant but the defendant was not at home and that on that occasion nothing was said about getting any liquor. The witness denied that he had ever told the agent that he and the defendant had made some liquor and the witness further testified that he did not fool with liquor except to occasionally take a drink and that the only liquor which the witness had drunk in a period of three months prior to the trial was what the agent, Martin, had given him. The witness further denied that he had ever agreed to sell the agent, Martin, ten gallons of liquor for $90.00, and further denied that he had ever offered to sell the agent any liquor at any price. That the witness was thirty-two years old and that the only liquor the witness had ever drunk was that given him by the agent, Martin.

E. M. Suttles, a witness for the defendant, being first duly sworn, testified as follows:

That he was a boy seventeen years of age and had never been convicted of anything in his life. That he met the agent, Martin, and accompanied him on one of his, the agent's trips and that the agent, Martin, on two occasions had given the witness liquor.

On cross-examination the witness testified that he was a witness in the trial because he had been summoned to appear and attend the trial and that he was not related to the defendant.

W. S. Smathers, a witness for the defendant, being first duly sworn testified as follows:

That the witness lived about three and a half miles north of Canton, N. C., and was by occupation a farmer.

That he had lived in Haywood County all his life and had known the defendant for about twelve years. That the witness knew the character and general reputation [fol. 15] of the defendant in his, the defendant's community and that it was good.

On cross-examination the witness testified that he knew nothing about the defendant selling any liquor.

H. P. HARRISON, a witness for the defendant, being firs' duly sworn testified as follows:

That he was a railway switchman and had lived in Haywood County, N. C., for eighteen years. That he had known the defendant for five or six years and that the defendant's general reputation was good.

There being no cross-examination, the witness stood aside.

L. D. WEST, a witness for the defendant, being first duly sworn, testified as follows:

That the witness was a farmer and had lived in Haywood County all of his life. That the witness had known the defendant for ten years and that the defendant's character was good.

There being no cross-examination, the witness stood aside.

The defendant rested and renewed his motion for a directed verdict of not guilty, or for a judgment as of nonsuit.

The motion was overruled and the defendant objected and excepted and the exception was then and there allowed.

[fol. 16] PROSECUTION'S REBUTTAL

M. A. WHITE, having heretofore testified as a witness of the United States, was recalled and testified further as follows:

That the witness on August 28th, 1930, went to the home of the defendant and the following testimony was had:

Q. Mr. White, did you buy some whiskey from this defendant, Sorrells?

Defendant objects.
Objection overruled.
Exception.

The Court: I do not think he can show by this witness that defendant committed some other kind of offense. * * * I think you can allege one sale of liquor and show a dozen. You can show he sold liquor. Go ahead and tell us about that transaction on the 28th.

A. On August 28th of this year—that other was on the 13th (of July), and this was the 28th of August—we went out to Mr. Sorrells' place, Mr. Martin and myself, and Mr. Sorrells came out to the automobile where we were—that is this gentleman right here—and I told him I wanted a half gallon of good whiskey, and he said that he had some good whiskey, and he and Mr. Martin go down the road about a hundred yards—about fifty yards or something like that, and turns off and goes down into a swamp, and comes back with a half gallon of whiskey in his possession, and I paid him for it right there at the car, in the presence of Mr. Martin.

Q. Now, did you go back there later?

A. Well, later on, I think it was along in September, I don't just remember the date, although I can refer to the date by looking at my record——

[fol. 17] Defendant objects, for that witness is testifying about an entirely different transaction.
Objection Overruled.
Exception.

(Witness continues:) Well, in company with Mr. Owens and Mr. Lance, we went back out there with a search warrant, and we looked around Mr. Sorrells' place there, and we didn't search his house, but we searched on the outside about 75 yards from his house, down in a thicket, we found eleven one-half gallon fruit jars, full of whiskey, and around a log, covered up with some brick and dirt, just

above his house, we found a ten gallon keg with about three and a half gallons of wine.

Mr. Patton: Where did you find this liquor, with reference to where he went to when he brought that half-gallon you bought?

A. In reference to where he went to, he went down in this same thicket, turned around and went into the thicket where he got the half-gallon I first bought from him. We went identically in the same direction, and to the same place where he had brought this first half-gallon from.

The defendant without waiving his former objection to the questions and answers of this witness and preserving his rights to such objections, cross examines the witness as follows:

On cross-examination the witness testified that he went to the home of the defendant on August, 1930, in company with the agent, Martin. That the witness himself is and was a Prohibition Agent and that the agent, Martin, had stated to the witness that he, Martin, had previously bought a half-gallon of liquor from the defendant and that the said Martin was in the army with the defendant. That the agent, Martin, told the witness that the defendant had a very bad reputation for selling whiskey and that Martin [fol. 18] and the witness would go back to the home of the defendant to ascertain whether or not such report was correct and that they did go back and see if the defendant was continuously selling whiskey. That the trip to the home of the defendant in 1930 was the first time the witness had ever seen the defendant but was not the first time the witness had heard of the defendant. That the witness made the trip as aforesaid for the purpose, if he could, of buying liquor from the defendant and denied that he went to the home of the defendant for the purpose of indicting the defendant in the event, he, the witness, was successful in securing liquor from the defendant. That the witness went to the home of the defendant in compliance with orders issued to him, the witness, by his superior officer and the witness refused to answer directly the question "Did he, the witness, go to the home of the defendant for the purpose of buying liquor and if successful, to thereupon indict the defendant for such offense?" But on the contrary, the

witness only answered that his purpose in going to the home of the defendant was, "Just like all the cases I have made in the last ten years, was to do justice to the defendant, to the Government, and make my report accordingly." That the defendants in all cases except three which I had been up by the witness since he had been a Prohibition Agent had been indicted and convicted.

CHARLES BRANTON, a witness for the Government, being first duly sworn, testified as follows:

That the witness knew the defendant and knew his general reputation and that it was bad for liquor.

On cross-examination the witness testified that he lived at Bryson City, N. C., which is about fifty or fifty-five miles from Canton, N. C., and that the witness operated in seven counties which include the County of Haywood. That he had heard of the defendant for the past three or four years and had heard that he was a liquor runner but had never heard that the defendant worked for the Fiber Company until he heard it during the trial. That the witness passed [fol. 19] through Canton, N. C., about once a month and that the witness knows of people who work every day in an adjoining county and every night that they are in a car with a load of liquor.

ROBERT HOWELL, a witness for the Government, being first duly sworn, testified as follows:

That he was an officer of Haywood County and knew the defendant and that his general reputation was that of a rum runner or liquor man.

On cross-examination the witness testified that he was a regular deputy sheriff and lived about sixteen miles from the defendant and that he had known the defendant for about three years.

F. H. MOODY, a witness for the Government, being first duly sworn, testified as follows:

That the witness lived in Waynesville, N. C., and was an officer of Haywood County, to-wit: the County Jailer.

That the witness knew the defendant and that his general reputation was that of a rum runner.

On cross-examination the witness testified that he had been an officer for three years and that his term of office expired in the month following that at which the trial was had. That the witness liked the defendant and knew that the defendant had worked for the Champion Fiber Company for seven or eight years.

J. B. BANKS, a witness for the Government, after being duly sworn, testified as follows:

That the witness knew the defendant and knew his gen- [fol. 20] eral reputation since February, 1930, and that he had a number of reports that the defendant was a liquor dealer.

On cross-examination the witness testified that he did not consider the defendant's character good. That in response to the question, "What is a man's character if you know?" The witness answered, "Well, a man's character is what he does, his general conduct in the community."

The Government then rested.

DEFENDANT'S MOTION FOR DIRECTED VERDICT

At the conclusion of all the testimony, the defendant moved his motion for a directed verdict of not guilty or for a judgment as of non-suit.

The motion was overruled and the defendant objected and excepted and the exception was then and there allowed.

The defendant then presented to the Court the following written request for instructions, which said instructions were denied and each instruction marked by the Court on the margin thereof "Not Given." The defendant objected and excepted and the exception was then and there allowed.

Defendant's Request for Instructions

The defendant respectfully requests the Court that the Jury be charged in part as follows:

1

The Court charges you as a matter of law that where officers of the law have incited a person to commit the crime charged, and lured him on with the purpose of arresting him in its commission, the law will not authorize a verdict of guilty.

Not given.

[fol. 21]

2

The Court charges you that the question of entrapment is not a question of law, but is a question of fact and is to be determined as a fact by the jury.

Not given.

3

If the jury find as a fact that the defendant in this case was induced to sell to the officers of the law the liquor as alleged in the bill of indictment and that such inducement on the part of the officers was for the purpose of arresting the defendant and convicting him of such charge that the jury will in such event return a verdict in favor of the defendant.

Not given.

4

If the jury shall find as a fact that the idea of the violation of the law as charged in the bill of indictment originated in the mind of the officer of the law and following such the defendant was induced to violate the law, such conduct on the part of the officer amounts in law to an entrapment, and the jury shall return a verdict in favor of the defendant.

Not given.

Respectfully submitted.
(Signed) J. Y. Jordan, Jr., Attorney for Defendant.

Charge to the Jury

The Court thereupon charged the jury as follows:

"Gentlemen of the Jury, the defendant's counsel takes [fol. 22] the position that this evidence shows that this man was induced or entrapped to sell liquor. The Court holds as a matter of law that was not the case, and the Court instructs that if you believe the testimony of Mr. Martin, the witness who said he bought a half gallon from the defendant. You will convict him then. You will take the case and go out with it, or you can form your opinion here."

Following the charge by the Court to the jury and before the jury retired to make up its verdict, the defendant objected and excepted to the charge of the Court.

The jury thereupon found the defendant guilty, whereupon the defendant moved for an arrest of judgment, which motion was overruled, and the defendant objected and excepted and the exception was then and there allowed.

The defendant then moved the Court to set aside the vrdict as contrary to the law and the evidence, which motion was denied and the defendant thereupon objected and excepted and the exception was then and there allowed, and the defendant in open Court gave notice of appeal and it was ordered by the Court that the defendant have ninety days within which to perfect his said appeal.

The foregoing bill of exceptions appears to be correct.

Thos. A. McCoy, Assistant U. S. Attorney. J. Y. Jordan, Jr., Attorney for Appellant.

Order Allowing Bill of Exceptions

The foregoing Bill of Exceptions is correct and is hereby allowed.

This the 3 day of March, 1931.

E. Y. Webb, United States Judge.

[fol. 23] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed Feb. 11, 1931

And the said C. V. Sorrells, the defendant herein, assigns the following errors in the record and proceedings in said cause:

I

The District Court of the United States for the Western District of North Carolina, erred in its failure to strike from the record the entire testimony of M. A. White, the first witness introduced by the Government in the proceedings.

II

That the said Court erred in its failure to strike from the record and exclude from consideration by the jury of the testimony or that portion of the testimony of R. V. Martin, the second witness offered by the Government as appears in the record as follows:

Q. You went with Mr. White?
A. Yes.
Q. When was that?
A. That was in August, I don't remember the exact date.
Q. Have you got any record of it?
A. Yes.
Q. Where is it?
A. I have a copy of my report. I didn't bring it with me, but I recall

Defendant objects.

The Court: Was it before or afterwards?
A. This? on the 13th of July was when I went by myself and later in August Agent White and I went out and purchased another half gallon which was delivered by the same man, Mr. Sorrells.

Defendant objects to the questions and answers and [fol. 24] moves that the questions and answers be stricken from the record.

Motion and objection overruled.

Defendant excepts.

III

That the Court erred in that upon the completion of the testimony of the Government and upon the announcement by the Government that it had rested its case, the defendant moved the Court for a directed verdict of not guilty or for a judgment as of non-suit, which motion was overruled and the defendant then and there objected and excepted and the said exception was then and there allowed.

IV

That the Court erred in that at the conclusion of all of the testimony, the defendant renewed his motion for a directed verdict of not guilty or for a judgment as of non-suit which motion was overruled and the defendant then and there objected and excepted and the exception was then and there allowed.

V

That the Court erred in its failure to submit in its charge to the jury the written request for instructions which were in apt time tendered and which appear in the record herein.

VI

That the Court erred in its charge to the jury which said charge was as follows:

"Gentlemen of the jury, the defendant's counsel takes the position that this man was induced or entrapped to sell liquor. The Court holds as a matter of law that was not the case and the Court instructs that if you believe the testimony of Mr. Martin, the witness who said he [fol. 25] bought a half gallon from the defendant, you will convict him then. You will take the case and go out with it or you can form your opinion here."

The defendant in the presence of the jury before its retirement objected and excepted to the charge of the Court and the exception was then and there allowed.

VII

That the Court erred in its failure and refusal to set aside the verdict as contrary to the law and the evidence

upon the motion of the defendant, which motion was denied and the defendant objected and excepted and the exception was then and there allowed.

VIII

That the Court erred in imposing upon the defendant a sentence of eighteen months in the United States Penitentiary, the said sentence being cruel and unusual punishment forbidden by the constitution of the United States.

For which errors the defendant prays that the said judgment of the United States Court for the Western District of North Carolina, dated November 20th, 1930, be reversed.

J. Y. Jordan, Jr., Attorney for Appellant.

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME

It appearing to the satisfaction of the Court that counsel for appellant has been unable to prepare and file in the United States Circuit Court of Appeals, the transcript of record on appeal in this case, it is, by consent, ordered that appellant's time for filing said transcript in the office [fol. 26] of the Clerk of the United States Circuit Court of Appeals, be, and the same is hereby, extended to April 19th, 1931.

This the 16th day of March, 1931.

(Signed) E. Y. Webb, United States District Judge for the Western District of North Carolina.

The foregoing order is consented to.

(Signed) Thomas A. McCoy, Asst. United States Attorney.

IN UNITED STATES DISTRICT COURT

MEMORANDUM OF CLERK RE APPEAL PAPERS

Petition for appeal filed 2-11-31.
Appeal allowed 2-9-31.

Appeal bond dated 11-21-30.
Penalty $500.00.
Obligors: C. V. Sorrells, T. C. Sorrells and Julie Sorrells, conditioned to pay costs.
Citation: Dated 2-9-31.

IN UNITED STATES DISTRICT COURT

STIPULATION OF COUNSEL RE TRANSCRIPT OF RECORD—Filed Apr. 2, 1931

It is hereby stipulated and agreed between counsel for C. V. Sorrells, Appellant, and the United States of America that the record in the case shall consist of the following: [fol. 27] (1) Bill of Indictment.
(2) Plea.
(3) Verdict.
(4) Judgment.
(5) Memorandum, Notice of Appeal, Petition for Appeal, Order Allowing Appeal.
(6) Bill of Exceptions.
(7) Assignment of Errors.
(8) Citation.
(9) This Stipulation.
(10) Clerk's Order to transmit Record.
(11) Order Extending Time to file Transcript of Record.
(12) Clerk's Certificate.

It is further stipulated and agreed between the parties hereto that the Clerk of this Court shall make up the transcript of the record in the above styled case and transmit the same to the United States Circuit Court of Appeals for the Fourth Circuit at Richmond, Virginia, and that it shall be printed under the supervision of the Clerk of that Court in accordance with Rule 23.

J. Y. Jordan, Jr., Attorney of Record for C. V. Sorrells, Appellant. Thos. A. McCoy, Asst. United States District Attorney and Attorney of Record for the United States of America, Appellee.

[fol. 28] IN UNITED STATES DISTRICT COURT

ORDER OF TRANSMITTAL

And thereupon, it is ordered by the Court here, that a transcript of the record and proceedings in the cause aforesaid together with all things thereunto relating be transmitted to the United States Circuit Court of Appeals for the Fourth Circuit; and the same is transmitted accordingly.

J. Y. Jordan, Clerk United States District Court, by O. L. McLurd, Deputy Clerk.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 29] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 3168

C. V. SORRELLS, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the Western District of North Carolina, at Asheville

DOCKET ENTRIES

April 6, 1931, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, bond, and citation are certified up under Sec. 7 of Rule 14.

Same day, the appearance of J. Y. Jordan, Jr., is entered for the appellant.

Same day, order extending the time to April 19, 1931, within which to file the transcript of record in this Court, is filed.

April 13, 1931, the appearance of Chas. A. Jonas, U. S. Attorney, and Thos. A. McCoy, Assistant U. S. Attorney, is entered for the appellee.

May 7, 1931, twenty-five copies of the printed record are filed.

[fol. 30] In United States Circuit Court of Appeals

Argument and Submission of Cause

June 18, 1931 (June term, 1931), cause came on to be heard before Northcott and Soper, Circuit Judges, and Way, District Judge, and is argued by counsel, and submitted.

In United States Circuit Court of Appeals

Order Restoring Cause to Docket for Reargument—Filed and entered November 11, 1931

For reasons appearing to the court, it is ordered that the above entitled case be, and the same is hereby, restored to the docket for a reargument to be had at the January term, 1932, of this Court.

Elliott Northcott, U. S. Circuit Judge.

November 11, 1931.

In United States Circuit Court of Appeals

Reargument and Submission of Cause

January 12, 1932 (January term, 1932), cause came on to be heard on reargument before Parker, Northcott and Soper, Circuit Judges, and is reargued by counsel, and submitted.

[fol. 31] IN UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT

No. 3168

C. V. SORRELLS, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the Western District of North Carolina, at Asheville

(Reargued January 12, 1932. Decided April 13, 1932)

Before Parker, Northcott, and Soper, Circuit Judges

J. Y. Jordan, Jr., for appellant, and Thomas A. McCoy, Assistant U. S. Attorney (Chas. A. Jonas, U. S. Attorney, and Frank C. Patton, Assistant U. S. Attorney, on brief), for appellee.

OPINION—Filed April 13, 1932

PARKER, Circuit Judge:

The appellant, defendant in the court below and hereafter so designated in this opinion, was convicted of selling [fol. 32] intoxicating liquor in violation of the National Prohibition Act, and was sentenced to a term of imprisonment. His assignments of error present two points for our consideration: (1) that the trial judge withdrew from the jury the defense of entrapment, and (2) that the judge admitted evidence of a sale of liquor at a date subsequent to that charged in the indictment and constituting a separate and distinct offense.

On the question of entrapment, the evidence was that one Martin, a federal prohibition agent, went to the home of the defendant in the country near Clyde, N. C. with three other young men and was introduced by them to defendant as a furniture dealer of Charlotte. After some conversation, Martin asked the defendant to get him some liquor, stating that he wished to take it to his partner in Charlotte. Defendant at first denied that he had any liquor;

but after further conversation, in the course of which Martin several times asked defendant to get liquor for him, and in which it developed that defendant and Martin had been soldiers in the same army division in the World War, defendant left and in a few minutes returned with a half gallon of liquor which he sold to Martin for $5.00. Defendant did not take the stand, but introduced a number of witnesses who testified that he was a man of good character and regularly employed by a wood fibre plant near his home. The government in rebuttal introduced testimony to the effect that defendant bore the reputation of being a rum runner. The court admitted, over defendant's objection, testimony to the effect that about six weeks after the sale charged in the indictment, as to which the defense of entrapment was asserted, defendant at his home sold a half gallon of liquor to Martin and another prohibition agent.

We think that the judge properly instructed the jury that there was no evidence of entrapment. Taken in the light most favorable to the defendant, the record shows [fol. 33] nothing more than that the prohibition agent misrepresented his employment, concealed his official position and made a purchase of liquor from defendant with the intention of prosecuting him for the violation of law involved in the sale. The only inducements to the sale were the requests of the agent that defendant get liquor for him and the price paid for the liquor. The defendant knew that he was violating the law and must be presumed to have intended to violate it, and there is nothing in the evidence excusing the violation. The fact that the officer requested defendant to make the sale to him did not justify the latter in doing that which the law forbade.

The defense of entrapment can be maintained only where as a result of inducement the accused is placed in the attitude of having committed a crime which he did not intend to commit or where by reason of the consent implied in the inducement no crime has in fact been committed. Thus, the defense has been sustained where an accused, not intending to sell liquor to an Indian in violation of law, made a sale to an Indian disguised so as to mislead the accused as to his identity. U. S. v. Healy, 202 Fed. 349; Voves v. U. S. (C. C. A. 7th), 249 Fed. 191. In such case

the accused lacked the intent to violate the law and was placed in the position of violating it by the trick of officers of the law who deceived him as to the identity of the purchaser. He was thus beguiled, not into a known violation of the law, but into the belief that an unlawful act was in fact lawful. The defense was not sustained, however, in a case where Indians were sent by officers to purchase the liquor but were not disguised. United States v. Amo, 261 Fed. 106.

And the defense will be sustained in a prosecution for crimes such as larceny, where the want of consent of the person affected is an essential element of the crime, and where the inducement supplies the consent. State v. Adams, 115 N. C. 775, 20 S. E. 722; U. S. v. Whittier, 5 Dill. 35, Fed. Cas. No. 16,668; Rex v. McDaniel, Fost. Crown [fol. 34] Law 121, 2 East P. C. 665. But as said by Judge Dillon in Whittier's case, supra, "this principle must be limited to the cases where the consent will, as a matter of law, neutralize the otherwise criminal quality of the act." In this class of cases, which is the class in which the defense originated, the distinction is made that where the criminal design originates with the accused, and the owner of the property does not suggest the design or actively urge the accused on to the commission of the crime, the defense may not be asserted though the owner neglects to protect his property or furnishes facilities for the execution of the design; and this distinction with reference to the origin of the criminal design has been applied by some courts to cases as to which it properly has no application, as where the act committed is a crime irrespective of the consent of the party affected by it. See Butts v. U. S. (C. C. A. 8th), 273 Fed. 35, 18 A. L. R. 143 and note; O'Brien v. U. S. (C. C. A. 7th), 51 Fed. (2d) 674 and note.

But we think it clear that where the doing of a particular act is a crime, regardless of the consent of anyone, and where the accused has intentionally committed such an act, he is guilty of a violation of law, irrespective of the temptation under which he acted or the motive or identity of the person who tempted him. See note of Mr. Francis Wharton to Bates v. U. S., 10 Fed. 92, 97 et seq., cited with approval by the Supreme Court in Grimm v. U. S., 156 U. S. 604, 610. If notwithstanding the consent implied in the

solicitation the gist of the offense remains, the accused is guilty. Hanish v. U. S. (C. C. A. 8th), 227 Fed. 584, 586. As said by the late Chief Justice Clark of North Carolina in State v. Smith 152 N. C. 798, 67 S. E. 508, 30 L. R. A. (N. S.) 946, a prosecution for the unlawful sale of intoxicating liquor, "it is not the motive of the buyer, but the conduct of the seller, which is to be considered."

[fol. 35] In the note of Mr. Wharton above mentioned, it is said:

"The only exceptions known to the principle before us exist (1) in cases in which to the offense it is essential that it should be 'against the will' of the party injured; and (2) in cases in which the offense consists in certain physical conditions which cannot exist if a trap be laid.

"(1) When it is a condition to an offense that it should be 'against the will' of the party injured, then there must be an acquittal should it appear that such party invited the defendant to the commission of the offense. This is the case with regard to prosecutions for rape: Reg. v. Fletcher, Bell, 63; 8 Cox, C. C. 131; Com. v. McDonald, 110 Mass. 405; Brown v. People, 36 Mich. 203; State v. Burgdor, 53 Mo. 65; Walter v. State, 40 Ala. 325; to prosecutions for highway robbery: Rex v. McDaniel, Fost. 121, 128; Long v. State, 12 Ga. 293; to prosecutions for assaults, which are not in themselves offenses against the public peace: Rex v. Wollaston, 12 Cox, C. C. 180.

"(2) When there are physical conditions of an offense inconsistent with a trap, so that these conditions cannot exist when there is a trap, then the defendant must be acquitted. The most striking illustration of this exception is to be found in the case of burglary already noticed. There can be no prosecution for burglary in cases where the door of the house was opened by its owner to give the burglar entrance.

"Whether, when the offense is the special product of the trap, the defendant can be convicted, depends upon the exclusiveness of the causal relationship between the offense and the trap. When the defendant was the passive tool of the entrapping party then there should be an acquittal. On the other hand, the defendant ought not to escape conviction in any case (with the exceptions above given) in

which he knowingly committed the offense. The most frequent cases under this head are prosecutions for illicit sales of liquor. In an English trial in 1881 (Rex v. Titley, [fol. 36] see London Law Times, July 30, 1881) a conviction of this class, when the sale was induced by the adroitness of a detective, was sustained, though it became subsequently the subject of much discussion in the house of commons. In Scotland (Blaikie v. Linton, 18 Scottish L. R. 583) a similar conviction in 1881 was set aside by the court of justiciary on the ground that the offense was the product of the solicitation. But this can only hold good in cases in which the offender's action is not imputable to his free agency."

It is to be noted that the Supreme Court has given no countenance to the doctrine of the cases which hold that a violator of the law is to be acquitted because the violation for which he is being prosecuted has been induced by the solicitation of officials of the government. On the contrary, that court has treated the acts of the officers, not as excusing the crime of the accused, but merely as furnishing an opportunity for its commission with a view of ascertaining whether the accused is engaged in an unlawful business. Grimm v. U. S., 156 U. S. 604; Goode v. U. S., 159 U. S. 663; Rosen v. U. S., 161 U. S. 29; Andrews v. U. S., 162 U. S. 420; Price v. U. S., 165 U. S. 311. Most of these are "decoy" letter cases; but there is no difference in principle between the case of an officer of the government who writes a letter soliciting an accused to commit a crime and an officer who personally solicits its commission. In both cases the crime is committed because the officer solicits it; and in both the porpose of solicitation is, not to make criminals, but to detect those who are engaged in criminal practices.

It is suggested that in the Supreme Court cases cited, the officers had reasonable grounds to suspect that the accused persons were engaged in a violation of law; and some cases have gone so far as to hold that where the defense of entrapment is asserted the burden rests upon the government to prove that in making purchases the officers acted upon reasonable grounds of suspicion. These cases [fol. 37] lay down a ground of distinction, however, which as a practical matter is impossible of application. It is for the jury to pass upon a defense of entrapment where

there is evidence supporting the defense; and to recognize the distinction suggested would be to open up before the jury an inquiry into the suspicions and information of officers of the law which would necessarily confuse the issue before them. But the distinction has no foundation in principle. The accused in such cases is not being tried for conducting a business, but for doing the specific thing which he has done because of the solicitation of the officer. He would not have done that thing but for the officer's conduct; and the only question is whether that conduct is to be treated as purging the act of the accused of its criminality or merely as affording an opportunity to the accused of committing the crime. The Supreme Court has taken the latter view of the matter, and reasonably so. Officers of the law are entitled to the presumption that they are acting in good faith and that in making purchases of liquor and narcotics, in sending decoy letters, etc., they are not engaged in an attempt to manufacture crime for the purpose of prosecuting it, but are attempting to apprehend those who are engaged in violating the law. If in response to their solicitation an accused violates the law, his offense is no less a violation because the opportunity to commit it has been afforded by the act of an officer.

The argument that in such case the criminal design arises not in the mind of the accused but in the mind of the officer is fallacious. The criminal design is the design on the part of the accused to violate the law; and that design, whatever the temptation, arises as a matter of fact in the mind of the accused. What the officer furnishes in such case is, not the criminal design or intent, but the temptation. Even if the inducement to crime be assumed to exist, the allegation of the defendant, as was well said in Onon-[fol. 38] daga County Com'rs v. Backus, 29 How. Pr. (N. Y.) 33, "Would be but the repetition of the plea as ancient as the world, and first interposed in Paradise: 'The serpent beguiled me and I did eat.' That defense was overruled by the great Lawgiver, and whatever estimate we may form, or whatever judgment pass upon the character or conduct of the tempter, this plea has never since availed to shield crime or give indemnity to the culprit, and it is safe to say that under any code of civilized, not to say Christian ethics, it never will."

While courts in some of the federal circuits have seemingly given their approval to the broad doctrine that inducement on the part of government officials is a sufficient defense for one charged with the sale of intoxicating liquors in violation of law, such holding is contrary to the weight of authority on the subject. State v. Smith, supra, 152 N. C. 798, 67 S. E. 508, 30 L. R. A. (N. S.) 946; Bauer v. Com., 135 Va. 463, 115 S. E. 514; State v. Rippey, 127 S. C. 550, 122 S. E. 397; State v. Gibbs 109 Minn. 247, 123 N. W. 810, 25 L. R. A. (N. S.) 449; Gordon v. State 7 Ga. App. 691, 67 S. E. 893; Borck v. State, — Ala. — 39 So. 580; Strother v. State 15 Ala. App. 106 72 So. 566; Onondaga County Com'rs v. Backus 29 How. Pr. (N. Y.) 33; Tripp v. Flanigan 10 R. I. 128; French v. State 149 Miss. 684, 115 So. 705; Wilson v. City of Roanoke, — Ala. — 135 So. 312; Whittington v. State 160 Ark. 257, 254 S. W. 532; Hadley v. U. S. (C. C. A. 8th) 18 Fed (2d) 507; Corcoran v. U. S. (C. C. A. 8th) 19 Fed. (2d) 901; DeLong v. U. S. (C. C. A. 8th) 4 Fed. (2d) 244; Zucker v. U. S. (C. C. A. 3d) 288 Fed. 12; Lucadamo v. U. S. (C. C. A. 2d) 280 Fed. 653; U. S. v. Reisenweber (C. C. A. 2d) 288 Fed. 520; Smith v. U. S. (C. C. A. 8th) 284 Fed 673; Goldstein v. U. S. (C. C. A. 7th) 256 Fed. 813. And see notes 30 L. R. A. (N. S.) 946; 17 Ann. Cas. 296; 18 A. L. R. 162; 66 A. L. R. 488; 16 C. J. 88, 89; 8 R. C. L. 129.

Defendant relies upon expressions contained in the [fol. 39] opinion of this court in Newman v. U. S. 299 Fed. 128, 131, to the effect that the government is estopped to prosecute where the criminal design originates, not with the accused, but with the government officers. The Newman case is authority for the proposition that defendant there was not entitled to certain instructions on entrapment, to the refusal of which he excepted; but in so far as the language of the opinion goes beyond this, it is not controlling. If it be understood as laying down the rule that one who knowingly and intentionally violates the law, and entertains the criminal design to violate it, is to be excused of his crime because same was induced by the act of an officer of the law, it goes too far and we cannot follow it.

Many opinions, which we shall not take the time to analyze, deal with the subject of entrapment as though the enforcement of the law were a game in which the law is to be penalized because officials do not play according

to the rules. Others confound the law with the personality of the officials who enforce it and, in cases where the criminal design is said to have originated in the mind of the officer rather than in the mind of the accused, apply a false doctrine of entrapment based in some decisions on estoppel, in others on shadowy grounds of public policy. Neither ground will withstand analysis.

So far as estoppel is concerned, it must be remembered that our government is one of laws and not of men. Officials of the government cannot by word or conduct set aside the law or authorize its violation. If an officer in an excess of zeal engages in unethical conduct, he is subject to censure or removal from office. If he violates the law, he is subject to punishment. But no conduct on his part justifies the violation of law by anyone else. It is well settled that in civil matters the government is not estopped by the acts of its officers "in entering into an arrangement or agreement to do or cause to be done what the law does [fol. 40] not sanction or permit." Utah Power & Light Co. v. U. S. 243 U. S. 389, 409; State of Utah v. U. S. — U. S. —, 52 Sup. Ct. Rep. 232. A fortiori no estoppel exists in criminal cases. Upon no logical basis can the government, which represents the whole people, be held to be estopped from prosecuting one who has violated a law enacted for the protection of society; nor can justification be found for allowing one who has knowingly violated such a law to go unwhipped of justice because his action has resulted from temptation by a government official. As was said by the Court of Appeals of New York in People v. Mills 178 N. Y. 274, 70 N. E. 786, 67 L. R. A. 131:

"While the courts neither adopt nor approve the action of the officers, which they hold was unauthorized, still they should not hesitate to punish the crime actually committed by the defendant. It is their duty to protect the innocent and punish the guilty. We are asked to protect the defendant, not because he is innocent, but because a zealous public officer exceeded his powers, and held out a bait. The courts do not look to see who held out the bait, but to see who took it."

As to public policy, there is no higher public policy than that all men should obey the law. It is true that it is not the

duty of officers "to incite to and create crime for the sole purpose of prosecuting and punishing it." But this is a matter which is to be considered when dealing with the officer, not one behind which a person who has intentionally violated the law may shield himself. When Congress in the exercise of the power conferred upon it by the people forbids certain conduct as criminal, he who violates the law so enacted is guilty of crime whatever the nature or source of his temptation to violate it; and it is not for the courts to say that crime thus committed is not crime because induced by improper conduct of government officials. Two wrongs do not make a right; and no public policy requires that the courts so declare.

[fol. 41] Congress has the power to declare what acts shall constitute crime. It has the power, also, to provide, if it sees fit to do so, that persons shall not be deemed guilty of crime if led into the commission of criminal acts by officers of the government. But in the absence of such provision, the courts have no power to grant immunity to such persons. For them to do so, is to usurp to that extent the pardoning power, which under our form of government is vested in the executive. This is in no sense a holding that the government or its officers can do no wrong. It is but the application of the salutary doctrine that the officers are not the government and that one who violates the law is not to be excused of his crime because of the wrongful conduct of others.

While the case at bar is one involving the violation of the liquor laws, the rule which we are asked to approve would not apply in liquor cases alone, but would furnish a haven of refuge to criminals generally. Most of the criminal laws enacted by the federal government denounce acts which are directed not against particular individuals but against the well being of the social order. For the detection and punishment of such crimes, the government must rely, not upon the voluntary action of aggrieved individuals, but upon the diligence of its officials whose duty it is to detect crime. One of the methods frequently used to detect violations of the postal laws, the anti-narcotic laws, the revenue laws, laws for the protection of the currency and many others, is to furnish to suspected violators an opportunity to violate them. In almost every case where such method succeeds the design to commit the par-

ticular act for which the accused is prosecuted is said to have arisen in the mind of the officer, and the accused claims that he has been entrapped. It is suggested that the plea should be sustained unless the officer can satisfy the jury that he had ground to suspect that the accused was guilty at the time that he furnished the opportunity; but, as stated above, to accept such suggestion would mean [fol. 42] that the trial would be diverted from an inquiry into the guilt of the accused into an inquiry into the information, motives and suspicions of the officer. These, we think, have nothing to do with the case; and it would be most unfortunate for any such practice to be engrafted on the law.

When society is grappling with organized crime, no public policy requires that the courts weaken the hands of the government by recognizing a defense for criminals which has not been created by statute and did not exist at common law, or that they impair the efficiency of trial procedure by allowing persons on trial for crime to inject as an issue to be tried by the jury the reasonableness of the suspicions of an officer when he laid a trap for their apprehension. It is time to get back to fundamentals. The law is supreme. No man may violate it with impunity. Government officials are not above the law; and nothing that they do excuses the violation of the law by anyone else. Courts should protect the innocent, but when a man knowingly and intentionally violates the law he is no longer innocent, whatever the source of his temptation.

If officers of the government have been guilty of unethical conduct in obtaining evidence against an accused, this is a matter which the jury may consider in passing upon their credibility. If the accused has not therefore been engaged in the commission of crime and has been induced by the officers to violate a law which he would not otherwise have violated, this is a matter which the judge can and should consider in inflicting punishment. But none of these matters exonerates one who has knowingly and intentionally violated the law of his country. No estoppel stays the hand of the government from prosecuting such violation; and no public policy grants amnesty to the violator.

There is no analogy between the rule here under consideration and that which forbids the use on the trial of [fol. 43] evidence obtained by a search in violation of the

4th and 5th Amendments to the Constitution. These amendments forbid the use of governmental force to search a man's home, his person, his papers or his effects. Paper v. U. S. (C. C. A. 4th) 53 Fed. (2d) 184; and evidence obtained in violation of the amendments is not admissible for the reason that to admit it would nullify the constitutional rights of the accused. Henderson v. U. S. (C. C. A. 4th) 12 Fed. (2d) 528; Agnello v. U. S. 269 U. S. 20. Here there is no contention that any constitutional right of the accused has been violated; and the question is, not as to the admissibility of evidence, but as to the validity of an asserted defense to crime.

Little need be said as to the admissibility of the evidence as to which exception was taken. Assuming without deciding that it was not admissible (but see Sauvain v. U. S. (C. C. A. 8th) 31 Fed. (2d) 732, and Billingsley v. U. S. (C. C. A. 6th) 274 Fed. 86), its admission could not have prejudiced defendant's cause for the reason that the evidence both of the government and of the defense showed without question that defendant made the sale of which he was convicted, and the only question which defendant raised with regard thereto was as to entrapment. In such case evidence of a subsequent sale could not by any possibility have effected the result.

For the reasons stated, the judgment of the court below will be affirmed.

Affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

DISSENTING OPINION

SOPER, Circuit Judge, dissenting:

The opinion of the court announces a rule of law contrary to that stated in its former decision in Newman vs. United States, 299 Fed. 128, in which it was held that under certain circumstances, entrapment of a defendant by government officials constitutes a valid defense. In that case Judge Woods said:

[fol. 44] "It is well settled that decoys may be used to entrap criminals, and to present opportunity to one intending or willing to commit crime. But decoys are not permis-

sible to ensnare the innocent and law-abiding into the commission of crime. When the criminal design originates not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor. The first duties of the officers of the law are to prevent, not to punish, crime. 'It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it.' Butts vs. United States (C. C. A.) 273 Fed. 35."

Judge Sanborn's comprehensive statement to the same effect in Butts vs. United States, supra, has been widely quoted with approval; and the doctrine has been accepted in every federal circuit.[1] The Supreme Court of the United States has had no occasion to say in any case before it that the accused had been improperly entrapped. The facts in each instance have shown merely a purpose on the part of the government's agents to ascertain whether the defendant was engaged in an unlawful business and not a design to induce or solicit the commission of a crime.[2] It

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[1] United States vs. Certain Quantities of Intoxicating Liquors (D. C. N. H.) 290 F. 824; Capuano vs. United States, (C. C. A. 1st) 9 F. (2d) 41; Lucadamo vs. United States, (C. C. A. 2nd) 280 F. 653; United States vs. Reisenweber, (C. C. A. 2nd) 288 Fed. 520; United States vs. Lynch, (D. C. N. Y.) 256 F. 983; Zucker vs. United States (C. C. A. 3rd) 288 F. 12; Newman vs. United States, (C. C. A. 4th) 299 F. 128; Vamas vs. United States, (C. C. A. 5th) 13 F. (2d) 347; Billingsley vs. United States, (C. C. A. 6th) 274 Fed. 86; Cermak vs. United States, (C. C. A. 6th) 4 F. (2d) 99; O'Brien vs. United States, (C. C. A. 7th) 51 F. (2d) 674; Butts vs. United States, (C. C. A. 8th) 273 F. 35; 18 A. L. R. 143-note; Robinson vs. United States, (C. C. A. 8th) 32 F. (2d) 505; 66 A. L. R. 468-note; Peterson vs. United States, (C. C. A. 9th) 255 F. 433; See Cornelius on Search and Seizure, Sec. 75 et seq.

[2] Grimm vs. United States, 156 U. S. 604; Goode vs. United States, 159 U. S. 667; Rosen vs. United States, 161 U. S. 29; Andrews vs. United States, 162 U. S. 420, 423; Price vs. United States, 165 U. S. 311.

has been sufficient for the court to point out that the in-
[fol. 45] vestigations of the agents had been conducted in a proper manner, and no decision has been based on the theory now advanced that the defense cannot exist in any case, if all of the elements of a crime are present. In its most recent decision on the question, Casey vs. United States 276 U. S. 419, the court held that a defense of entrapment should be overruled, and a conviction for violation of the narcotic laws should be sustained, because the government officers, who got the evidence with the aid of a decoy, had probable cause to suspect that the defendant wa a habitual violator, and did nothing to induce him to commit the crime beyond a simple request to furnish the drugs contrary to law. The Supreme Court has gone no further than to hold, in harmony with the widely accepted rule, that entrapment is no defense when the officers of the government merely present an opportunity to a suspected person to violate the law.

It is of course true that no conduct on the part of the officers of the government can authorize or excuse a violation of the law. Nevertheless, it has been thought by the federal judiciary with striking unanimity that the government should not be allowed to prosecute a man who has been transformed from a law abiding citizen into a criminal by the activities of its agents. It is agreed that there is no place in our system of law for the idea that the government can do no wrong. Langford vs. United States, 101 U. S. 341. Such a prosecution is rarely undertaken, as those who have had experience in the federal courts well know; most frequently the defense of improper entrapment is merely a groundless excuse offered by those who would escape the penalty of their offenses. But when the defense is sustained by the proof, fair dealing demands that the prosecution shall fail.

We do not satisfy this ideal by an appeal to the doctrine
[fol. 46] that in civil affairs, the government is not estopped by the unlawful acts or neglects of its agents. That rule is designed to relieve the government from responsibility for the unauthorized acts and delinquencies of persons in its employ. Judge Story, in a case of laches, said that the rule was based not upon the notion of extraordinary prerogative, but upon a great public policy. United States vs. Kirkpatrick, 9 Wheat. 720, 735; United States vs. Hoar,

2 Mason, 311. See also United States vs. Whiteside, 93 U. S. 247, 257. The manifold operations of the government can be conducted only through numerous agents. One who deals with them is obliged to take notice of the limitations upon their powers, and may not assert any claim or defense based upon either laches or neglect; for otherwise, the most serious losses to the public could not be avoided with the utmost vigilance. So understood, the doctrine seems to furnish little reason to permit the government to adopt and ratify conduct on the part of its agents, which no one undertakes to justify. It is likely enough that the rule of entrapment now generally accepted in other federal circuits is an extension of the law laid down in those cases like larceny, in which the consent of the injured party is inconsistent with the existence of the crime; but the development, illogical though it may have been, has taken place, and we should gain nothing if we should now retrace our steps. "The life of the law has not been logic; it has been experience." Holmes, The Common Law, 1.

The facts in the pending case justify an application of the prevailing rule. Sorrells was regularly employed by the Champion Fibre Company at Canton, North Carolina, and had not missed a pay day since March, 1924. On Sunday, July 13, 1930, a prohibition agent visited Sorrells' home in the country near the village of Clyde, North Carolina, in order to try to buy intoxicating liquors from him, and if successful, to prosecute him for violation of the National Prohibition law. The agent was accompanied by [fol. 47] three young men, residents of the community. One of them introduced him to Sorrells as a furniture dealer from Charlotte, on a vacation, who was desirous of procuring some good whisky. The agent asked Sorrells to get it; but he said that he did not have any whisky and that he did not fool with it. The agent and his associates nevertheless remained at the house for an hour and a half, and during this interval, it transpired that Sorrells and the agent and one of the others had served in the same division of the American Army during the Great War. Their experiences in the war were discussed; and during the conversation, the agent asked Sorrells three or four times to get some whisky, but each time was met with the same response as at first. The request was again renewed,

and finally Sorrells said that he would go and see if he could get some. He left his home and was gone from twenty to thirty minutes, returning with a half gallon of whisky which he delivered to the agent in exchange for the sum of five dollars. There was evidence tending to show that Sorrells bore a good reputation in the community. To offset this testimony, the government called a number of witnesses in rebuttal who said that for a considerable period prior to the sale, Sorrells had the general reputation of being a rum-runner, and that this reputation was known to the agent. The government also proved that Sorrells made a subsequent sale of intoxicating liquor on August 28, 1930, when solicited by the prohibition agent, and also that a search of the defendant's premises two weeks later revealed eleven one-half gallon jars of whisky hidden in a thicket seventy-five yards from the defendant's house and a ten gallon keg containing three and a half gallons of wine secreted near his residence.

From this evidence, the jury might have found that the defendant had been an industrious law abiding man, who had never violated the National Prohibition law prior to [fol. 48] the sale charged in the indictment; and that he was over persuaded on that occasion by the persistent requests of his former comrades in arms to leave his home and procure the liquor they desired. On the other hand, the jury might have concluded that the agent had reason to suspect that the defendant was a law-breaker, and that the event proved this to be true when once the defendant was convinced that he might safely do business with his visitors. The District Judge refused to submit the issue thus raised and charged the jury that the evidence showed that the defendant was not induced or entrapped to sell the liquor, and that if the jury believed that the sale was made, they should find a verdict of guilty. The defendant was convicted and sentenced to serve a term of eighteen months in the penitentiary. It was not a case for peremptory instructions by the District Judge either way, if improper entrapment is a valid defense, for conflicting inferences might reasonably have been drawn from the evidence, and a question of fact for the determination of the jury was presented. Chicago & N. W. Ry. Co. vs. United States, 234 F. 272; Western Union Tel. Co. vs. Hall, 287 F. 297.

[fol. 49] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 3168

C. V. SORRELLS, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the Western District of North Carolina

JUDGMENT—Filed and Entered April 15, 1932

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of North Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby affirmed.

John J. Parker, Senior Circuit Judge.

April 15, 1932.

MEMORANDUM AS TO MANDATE

On another day, to-wit, April 26, 1932, the mandate of this Court, in this cause, is issued and transmitted to the [fol. 50] United States District Court at Asheville, North Carolina, in due form.

Same day, the original petition for appeal, order allowing appeal, and bond are returned to the Clerk of the District Court at Asheville, North Carolina.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 51] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted, limited to the question whether the evidence was sufficient to go to the jury upon the issue of entrapment. The case is advanced and assigned for argument on Monday, November 7th next after the cases heretofore assigned for that day.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,874. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 177. C. V. Sorrells, petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed June 27, 1932. File No. 36,874.